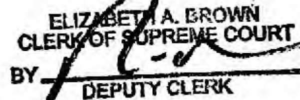
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES SCOTT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77456-COA

FILED

FEB 11 2020



ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature] DEPUTY CLERK

ORDER OF AFFIRMANCE

James Scott appeals from a judgment of conviction entered pursuant to a jury verdict of conspiracy to commit robbery, robbery, and grand larceny of a motor vehicle. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Sufficiency of the evidence

Scott claims that insufficient evidence supports his conviction for grand larceny of a motor vehicle because the State failed to prove he had the requisite intent to be liable as a principal, an aider and abettor, or a coconspirator. We review the evidence in the light most favorable to the prosecution and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The State presented evidence that the victim used an app called Mycelium to find a Bitcoin seller. A person with the user name BTC Warrior responded, expressed an interest in selling Bitcoin, and provided

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his phone number. The victim and BTC Warrior communicated by text message and ultimately agreed to meet at a local Target.

The victim wanted to buy two Bitcoin at market value. He planned to pay for them with cash and a money transfer that he would make using a Wells Fargo app. He met James Scott at the Target. He showed Scott the $20,000 he brought in cash and demonstrated his ability to transfer money using the phone number that Scott provided. However, he cancelled the transaction when Scott was unable to prove he could transfer Bitcoin to the victim's online wallet.

After Scott left, the victim became suspicious and suspected that he might get robbed. He stayed in the Target, he called his wife and asked her to meet him, and he secretly passed her the $20,000 when she arrived. He left the Target without his wife, stopped at a 99 Cents Store, and then went to a McDonald's to get something to eat.

The victim was attacked by two men as he started to get into his truck. They pulled him to the ground, went through his pockets, and asked "where is the money." They also searched his truck. The victim recognized one of them as Scott and the other as someone he had seen in both the Target and the McDonald's. The victim later identified the second man as Rodrigo Haynes.

Scott and Haynes took the victim's truck keys, laptop computer, work phone, personal phone, identification, and several other items. Haynes drove off in the victim's truck, and Scott followed Haynes in a red Dodge Challenger. The victim called for help after they left. He gave the responding police officers details about the robbery, descriptions of the

perpetrators, and a description of the Dodge Challenger. The victim's truck was later found abandoned outside the Silverton Hotel and Casino.

During the investigation that followed, police detectives obtained surveillance video from the Target, the McDonald's, and the Silverton. The Target video depicted Scott arriving in a red car and wearing a plaid shirt, the car being repositioned while Scott was inside the Target, and Scott leaving in the car. The McDonald's video depicted both the victim and a person matching the description of one of the perpetrators inside the restaurant. And the Silverton video depicted a red Dodge Challenger parked next to the victim's truck, the driver of the Challenger searching for something in the truck, and the driver of the Challenger and the driver of the truck leaving in the Challenger.

Detective Pelayo was able to identify the perpetrators through the phone numbers they had provided to the victim during the Bitcoin transaction. By searching for these numbers in Facebook, and using various law enforcement databases, the detective determined that one of the phone numbers belonged to Scott and the other belonged to Haynes. The detective also determined that Haynes was one of the customers depicted in the McDonald's surveillance video, Haynes and Scott were connected to a red Dodge Challenger bearing Indiana license plate number XPC386, and the red Dodge Challenger was associated with a house at 5343 Summertime Drive.

Detective Pelayo created a Mycelium account, he pretended to be a Bitcoin buyer, and made contact with BTC Warrior. BTC Warrior provided him with a phone number to communicate with, and it was the

same phone number that BTC Warrior had provided to the victim. The detective arranged to meet BTC Warrior at Dotty's Casino. And he and other detectives arrested Scott and Haynes when they arrived at the casino.

Thereafter, Detective Pelayo called the phone numbers that the victim had been given to communicate with BTC Warrior and transfer money to Scott's account, and the phones taken from Scott and Haynes when they were arrested rang. Both Scott and Haynes admitted that they traveled to the Target in a red Dodge Challenger to make a Bitcoin transaction. And detectives found the plaid shirt that Scott was seen wearing on the Target surveillance video when they executed a search warrant on the house at 5343 Summertime Drive.

We conclude a rational juror could reasonably infer from this evidence that Scott possessed the intent necessary to commit the offense of grand larceny of a motor vehicle as a coconspirator or an aider and abettor. *See* NRS 195.020; NRS 205.228(2); *Sharma v. State,* 118 Nev. 648, 659, 56 P.3d 868, 874 (2002) ("[I]ntent can rarely be proven by direct evidence of a defendant's state of mind, but instead is inferred by the jury from the individualized, external circumstances of the crime, which are capable of proof at trial."). It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports its verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Evidentiary rulings

Scott claims the district court improperly admitted evidence during the course of his trial. "We review a district court's decision to admit

or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (internal quotation marks and footnote omitted).

If the district court's decision to admit or exclude evidence is not preserved for appeal, appellate review of the decision is forfeited unless the defendant demonstrates plain error. *Mclellan*, 124 Nev. at 267, 182 P.3d at 109. To demonstrate plain error, the defendant must show "(1) there was error; (2) the error is plain, meaning that it is clear under the current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) (internal quotation marks omitted), *cert. denied*, 139 S.Ct. 415 (2018).

Authentication

Scott claims the district court abused its discretion by admitting unauthenticated evidence. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims." NRS 52.015(1). "Because the authentication inquiry is whether the matter in question is what its proponent claims, the proponent of the evidence can control what will be required to satisfy the authentication requirement by deciding what he offers it to prove." *Rodriguez v. State*, 128 Nev. 155, 160-61, 273 P.3d 845, 848-49 (2012) (internal quotation marks omitted). "The [proponent] need

only make a prima facie showing of authenticity so that a reasonable juror could find in favor of authenticity or identification. Once the prima facie case for authenticity is met, the probative value of the evidence is a matter for the jury." *United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir. 1996) (internal quotation marks and citation omitted); *see Rodriguez*, 128 Nev. at 848 n.4, 273 P.3d at 160 n.4 (concluding that federal decisions construing Federal Rule of Evidence 901(a) provide persuasive authority for construing NRS 52.015(1)).

First, Scott claims the district court abused its discretion by admitting Exhibits 15, 17, and 18. He asserts that these exhibits consisted of screen shots of a cell phone tracking app that was used to generate maps depicting the GPS locations of the victim's stolen cell phones. He argues that the victim did not possess sufficient knowledge about GPS to authenticate the exhibits and the district court erred by relying upon *Burnside v. State*, 131 Nev. 371, 352 P.3d 627 (2015), and *Johnson v. Maryland*, 179 A.3d 984 (Md. 2018), in reaching its decision.

The record demonstrates that Scott provided the district court with a citation to the *Burnside* opinion to support his argument that expert testimony was required to authenticate the State's exhibits and the State provided a citation to the *Johnson* opinion to support its argument that a lay witness could authenticate its exhibits. The district court considered these opinions and ruled that if the victim uses the cell phone tracking app and he finds it to be accurate and reliable then he can testify about it. The victim testified that he was able to track his phones using a Google phone tracking app; he used this technology on a daily or regular basis; he found

it to be very accurate; the app could depict timelines that showed where his phones had been; and Exhibits 15, 17, and 18 were screen shots of those timelines.

We conclude from this record that the district court did not abuse its discretion by finding that the exhibits were sufficiently authenticated and allowing them to be admitted into evidence. *See Johnson*, 179 A.3d at 994-95 (discussing GPS data and holding that expert testimony is not necessary every time information derived from a GPS device is offered into evidence). Moreover, even if there was error, the error was harmless because without these exhibits there was still ample direct and circumstantial evidence for the jury to find Scott guilty of the charged offenses. *See Newman v. State*, 129 Nev. 222, 236, 298 P.3d 1171, 1181 (2013) ("A nonconstitutional error, such as the erroneous admission of evidence at issue here, is deemed harmless unless it had a substantial and injurious effect or influence in determining the jury's verdict." (internal quotation marks omitted)).

Second, Scott claims the district court erred by admitting Exhibits 23 and 24. He asserts these exhibits consist of documents that were printed from Scott's and Haynes' Facebook profiles. He argues the documents were not properly authenticated because the State failed to "provide factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of a system or process that does so" as required by *People v. Johnson*, 28 N.Y.S.3d 783, 792 (N.Y. Cty. Ct. 2015). However, Scott did not object to the

admission of these exhibits; consequently, he is not entitled to relief absent a demonstration of plain error. The record establishes that the exhibits were admitted after Detective Pelayo testified that he searched Facebook using the phone numbers that were provided to the victim during the attempted Bitcoin transaction, he printed Exhibits 23 and 24 from Facebook, and Exhibits 23 and 24 fairly and accurately depicted what he found when he searched Facebook. We conclude the alleged error does not appear plainly in the record, and we note that Nevada courts are not bound by New York court decisions.

Third, Scott claims the district court erred by admitting Exhibit 25. He asserts that this exhibit consisted of a photograph of the red Dodge Challenger bearing Indiana license plate number XPC386. He argues that it was not properly authenticated because Detective Pelayo could only connect the red Dodge Challenger to Scott, Haynes, and the house at 5343 Summertime Drive through hearsay. However, Scott did not object to the admission of this exhibit; consequently, he is not entitled to relief absent a demonstration of plain error. The record establishes that Detective Pelayo verified the license plate number depicted on the exhibit and then testified that the exhibit depicted the red Challenger that he had been "able to associate with Rodrigo Haynes." Because Exhibit 25 appears to be what the proponent claims it is, we conclude the alleged error does not appear plainly on the record.

Fourth, Scott claims the district court erred by admitting Exhibit 12. He asserts that this exhibit consisted of a screen shot of a Zelle money transfer that was made through a Wells Fargo app. He argues that

it was not properly authenticated because the State failed to demonstrate it was a business record or "provide factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of a system or process that does so." However, Scott did not object to the admission of this exhibit; consequently, he is not entitled to relief absent a demonstration of plain error. The record establishes the victim testified that Exhibit 12 was a record of the Zelle transactions he made during the course of a month. Because Exhibit 12 appears to be what the proponent claims it is, we conclude the alleged error does not appear plainly on the record.

Fifth, Scott claims the district court erred by admitting Exhibits 3 through 11 and 28 through 31. He argues that these exhibits consisted of Mycelium and text messages that were not properly authenticated because the State failed to establish the identity of the people who were sending and receiving these messages. However, Scott did not object to the admission of these exhibits; consequently, the State was not required to "provide sufficient direct or circumstantial corroborating evidence of authorship in order to authenticate" the text messages. *Rodriguez*, 128 Nev. at 162, 273 P.3d at 849. Moreover, some circumstantial evidence was presented that Scott authored these text messages because the text messages established the time and place for the Bitcoin transactions and Scott was present at the time and place for both transactions. *See id.* Accordingly, we conclude alleged error does not appear plainly on the record.

Hearsay evidence

Scott claims the district court abused its discretion by admitting inadmissible hearsay into evidence. Hearsay is an out-of-court "statement offered in evidence to prove the truth of the matter asserted." NRS 51.035. A statement is "[a]n oral or written assertion; or . . . [n]onverbal conduct of a person, if it is intended by him as an assertion." NRS 51.045. Hearsay is inadmissible unless it falls within an exemption or exception. NRS 51.065.

First, Scott claims the district court abused its discretion by admitting Exhibits 15, 17, and 18. He asserts that these exhibits consisted of screen shots taken of a cell phone tracking app. He argues that the maps generated by the cell phone tracking app were hearsay because they asserted the locations of the stolen cell phones and were used to prove the truth of the matter asserted. However, we conclude the district court did not abuse its discretion by admitting these exhibits because the assertions made by the cell phone tracking app are not statements as defined by the hearsay rule. *See United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1109-10 (9th Cir. 2015) (holding that "[a] tack placed by the Google Earth program and automatically labeled with GPS coordinates isn't hearsay" and joining other federal circuit courts of appeal in the rule that "machine statements aren't hearsay").

Second, Scott claims that the district court erred by admitting Exhibits 23 and 24. He asserts that these exhibits consist of documents that were printed from Haynes' Facebook profile. He argues that the documents constituted hearsay because they provided and verified the

identity of Haynes' and Scott's phone numbers and they were used to prove the truth of the matter asserted. However, Scott did not object to the admission of these exhibits; consequently, he is not entitled to relief absent a demonstration of plain error. We conclude the alleged error does not appear plainly on the record, which demonstrates that Exhibits 23 and 24 were merely offered to support Detective Pelayo's testimony about actions he took during the course of his investigation. *See generally Wallach v. State*, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990) ("A statement merely offered to show that the statement was made and the listener was affected by the statement, and which is not offered to show the truth of the matter asserted, is admissible as non-hearsay.").

Third, Scott argues that the district court erred by admitting Exhibit 12. He asserts that this exhibit was created from a screen shot of a Zelle transfer that was made using a Wells Fargo app. He argues that the screen shot was hearsay because it asserted that the victim transferred money to a person who gave his name as James Scott and it was used to prove the truth of the matter asserted. However, Scott did not object to the admission of this exhibit; consequently, he is not entitled to relief absent a demonstration of plain error. Even assuming without deciding that Exhibit 12 was improperly admitted into evidence, Scott has not shown that the error was prejudicial because other substantial evidence established that Scott went to the Target on the pretext of selling the victim Bitcoin. Accordingly, we conclude Scott is not entitled to relief. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) ("[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice.").

Lay opinion testimony

Scott claims the district court abused its discretion by admitting a lay witness' opinion testimony. Lay opinion testimony is admissible if it is "[r]ationally based on the perception of the witness" and "[h]elpful to a clear understanding of his testimony or the determination of a fact in issue." NRS 50.265. "Generally, a lay witness may testify regarding the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." *Rossana v. State*, 113 Nev. 375, 380, 934 P.2d 1045, 1048 (1997) (internal quotation marks omitted).

First, Scott argues that Detective Pelayo presented improper lay opinion testimony as to what was depicted in the Silverton surveillance video. However, Scott did not object to this testimony on the ground he now urges on appeal; consequently, he is not entitled to relief absent a demonstration of plain error. The record establishes that the Silverton surveillance video had previously been admitted into evidence, Detective Pelayo narrated the vehicle and people movements depicted in the video, and Detective Pelayo stated that the red vehicle was a Dodge Challenger. We note that a police officer's narration of a surveillance video is permissible if it assists the jury in evaluating what is depicted in the video. *Burnside*, 131 Nev. at 388-89, 352 P.3d at 639-40. And we conclude from this record that there was no error.

Second, Scott argues that Detective Pelayo presented improper lay opinion testimony as to who was depicted in the images taken from a

Facebook profile. However, Scott did not object to this testimony; consequently, he is not entitled to relief absent a demonstration of plain error. The record establishes that Detective Pelayo testified that he searched Facebook using the phone number the victim had used to communicate with the person who expressed an interest in selling Bitcoin. The Facebook search linked the Bitcoin seller's phone number to Rico Haynes' profile, and a comment on that profile indicated that Haynes had a different first name. Detective Pelayo searched Haynes' name in the databases commonly used by the law enforcement profession and came up with Rodrigo Haynes' name. Detective Pelayo obtained a photograph of Rodrigo Haynes from the databases, he compared the photograph with Rico Haynes' Facebook profile, and he determined that Rico Haynes and Rodrigo Haynes were one and the same. We conclude from this record that there was no error.

Third, Scott argues that Detective Pelayo presented improper lay opinion testimony as to who was depicted in the McDonald's surveillance video. However, Scott did not object to this testimony; consequently, he is not entitled to relief absent a demonstration of plain error. The record establishes that the McDonald's surveillance video had previously been admitted into evidence. Detective Pelayo testified that he compared the photograph of Haynes he obtained from his database search with the McDonald's surveillance video and determined that Haynes was depicted in the video. We conclude from this record that there was no error.

Fourth, Scott argues that Detective Pelayo presented improper lay opinion testimony as to who was depicted in the Target surveillance

video. However, Scott did not object to this testimony; consequently, he is not entitled to relief absent a demonstration of plain error. The record establishes that the Target surveillance video had previously been admitted into evidence. Detective Pelayo testified he was able to locate a photograph of Scott, he compared the photograph of Scott with the Target surveillance video, and he was able to identify Scott "[f]rom the Target video." We conclude from this record that there was no error.

Fifth, Scott argues that Detective Pelayo presented improper lay opinion testimony as to a plaid shirt that Scott allegedly wore at the time of the robbery. However, Scott did not object to this testimony on the ground he now urges on appeal; consequently, he is not entitled to relief absent a demonstration of plain error. The record establishes that Detective Pelayo testified that he was present when the search warrant was executed on the house at 5343 Summertime Drive, "[t]he same plaid shirt that was seen in the Target video" was located during the search, and Exhibits 26 and 27 were photographs of the plaid shirt. Detective Pelayo further testified that the exhibits fairly and accurately depicted the plaid shirt that was located during the search. We conclude from this record that Scott has not shown error affecting his substantial rights, and therefore, he has not demonstrated plain error.

Sufficiency of the charging document

Scott claims the charging document failed to provide adequate notice of the State's aiding and abetting theory of criminal liability. He argues that the charging document consisted of conclusory language and did not contain specific allegations describing how he counseled,

encouraged, hired, commanded, induced, or procured another person to commit robbery and grand larceny of a motor vehicle. And he cites to *Barren v. State*, 99 Nev. 661, 668, 669 P.2d 725, 729 (1983) (A charging document alleging a theory of aiding and abetting "should provide additional information as to the specific acts constituting the means of the aiding and abetting so as to afford the defendant adequate notice to prepare his defense.").

Scott did not challenge the sufficiency of the charging document in the court below. "If the sufficiency of an indictment or information is not questioned at the trial, the pleading must be held sufficient unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted." *Larsen v. State*, 86 Nev. 451, 456, 470 P.2d 417, 420 (1970) (internal quotation marks omitted). Scott has not demonstrated that the charging document was so defective that it did not charge the offenses of robbery and grand larceny of a motor vehicle or apprise him of the facts surrounding these offenses. Therefore, we conclude no relief is warranted.

Adequacy of the jury instructions

Scott claims the district court failed to properly instruct the jury because it did not provide an accurate instruction on aiding-and-abetting liability. He argues the jury should have been instructed that aiding-and-abetting liability only applies if the State proves he assisted another person in taking the victim's truck with the specific intent to permanently deprive the victim of his truck. And he cites to *Bolden v. State*, 121 Nev. 908, 914, 124 P.3d 191, 195 (2005), *receded from by Cortinas v. State*, 124 Nev. 1013,

1016, 195 P.3d 315, 317 (2008), and *Sharma v. State*, 118 Nev. 648, 656-57, 56 P.3d 868, 872-74 (2002).

Scott did not object to the jury instructions on the ground he now urges on appeal; consequently, he is not entitled to relief absent a demonstration of plain error. *See Green*, 119 Nev. at 545, 80 P.3d at 95 (discussing unpreserved challenges to jury instructions). We note the instructions as a whole correctly informed the jury it must find that Scott specifically intended to permanently deprive the victim of his truck in order to find him guilty of grand larceny of a motor vehicle. *See Harrison v. State*, 96 Nev. 347, 350, 608 P.2d 1107, 1109 (1980) ("[W]hen jury instructions, as a whole, correctly state the law, it will be assumed that the jury was not misled by any isolated portion."). And we conclude Scott failed to demonstrate plain error because he has not shown the trial result would have been different if another aiding-and-abetting-liability instruction had been given. *See Green*, 119 Nev. at 545, 80 P.3d at 95 ("[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice.").

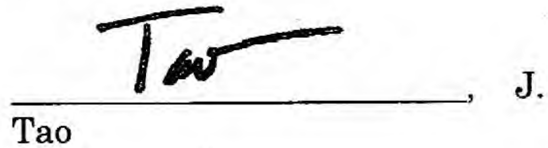
Cumulative error

Scott claims cumulative error deprived him of a fair trial. However, to the extent there was any error, we conclude the cumulative effect of the error did not warrant relief. *See Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (discussing cumulative error); *see also United States v. Barrett*, 496 F.3d 1079, 1121 n.20 (10th Cir. 2007) (recognizing a split in authority as to cumulative error analysis when plain errors are implicated and declining to resolve "how to, if at all, incorporate

into the cumulative error analysis plain errors that do not, standing alone, necessitate reversal").

Having concluded that Scott is not entitled to relief, we ORDER the judgment of conviction AFFIRMED.

_______________, C.J.
Gibbons



_______________, J.
Tao

_______________, J.
Bulla

cc: Hon. Michelle Leavitt, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk